

Before the
COPYRIGHT ROYALTY JUDGES
Washington, D.C.

<i>In re</i> DISTRIBUTION OF CABLE ROYALTY FUNDS	CONSOLIDATED DOCKET NO. 14-CRB-0010-CD/SD (2010-13)
<i>In re</i> DISTRIBUTION OF SATELLITE ROYALTY FUNDS	

**REPLY IN SUPPORT OF MOTION TO QUASH DISCOVERY REQUESTS OF
MULTIGROUP CLAIMANTS**

The Motion Picture Association of America, Inc. (“MPAA”) hereby submits its reply in support of its motion seeking to quash (“Motion To Quash”) discovery requests that Multigroup Claimants (“MGC”) served on MPAA in the Distribution Phase of the captioned proceedings on January 8 and 9, 2018 (“MGC Requests”). MGC filed its Opposition to the Motion To Quash on January 29, 2018 (“MGC Opposition”).

BACKGROUND

On December 29, 2017, MGC filed a pleading captioned “Multigroup Claimants’ Written Direct Statement” in the Distribution Phase of this consolidated proceeding (“MGC December 29 Filing”). However, as MPAA and the Settling Devotional Claimants (“SDC”) explained in their January 9, 2018 Motion To Strike MGC’s Purported Written Direct Statement And Dismiss MGC From The Distribution Phase (“Joint Motion To Strike”), the MGC December 29 Filing was *not* a written direct statement because MGC failed to include the elements of a written direct statement mandated by the Copyright Royalty Judges’ (“Judges”) regulations, orders, and the Copyright Act. Specifically, the MGC December 29 Filing asserted arbitrary claims without evidentiary support, failed to incorporate the Judges’ October 23, 2017 *Ruling And Order*

Regarding Objections To Cable And Satellite Claims (“Claims Order”), and failed to include a distribution methodology—in violation of the Judges’ regulations and orders in this proceeding. *See* Joint Motion To Strike at 3-8. These failures are fatal to MGC’s claims in this proceeding, and warrant automatic dismissal of MGC from the Distribution Phase of this proceeding. *See id.* at 8-10. These failures also place MGC in procedural default in the Distribution Phase of this proceeding, rendering it ineligible to receive Distribution Phase discovery from other, eligible participants. *See* Motion To Quash at 3-5.

MPAA filed the Motion To Quash the MGC Requests on January 12, 2018. On the same day, the Judges wrote to counsel for MPAA, SDC, and MGC via email, advising the parties of their determination that “there is no controversy with regard to applicable methodologies relating to distribution of cable or satellite royalty payments on deposit,” and requesting that the parties participate in a conference call with the Judges to discuss whether the parties would agree to a stipulation regarding Distribution Phase royalty shares. *See* Exhibit A, Declaration of Lucy Holmes Plovnick (“Plovnick Declaration”) at Exhibit 1. The parties and the Judges participated in the requested conference call on January 25, 2018. During that call, the parties and the Judges discussed placing all motions on hold in order to allow the parties to explore whether they could resolve the Distribution Phase of this proceeding via stipulation. *See* Exhibit A, Plovnick Declaration at ¶ 4. The parties and the Judges also discussed providing MGC a means to perform accuracy checking on the computations implementing the MPAA and SDC methodologies without prejudice to MPAA and SDC’s pending motions; the need for MGC to identify a qualified expert to perform such accuracy checking; and the information MGC would require regarding the software applications used by MPAA and SDC in order to identify such a qualified expert. *See id.* at ¶ 4.

Immediately following the parties' conference call with the Judges, SDC and MPAA provided MGC with information regarding the software applications used in their respective methodologies, and requested that MGC identify a qualified expert who could perform accuracy checking on the computations implementing the MPAA and SDC methodologies. *See* Exhibit A, Plovnick Declaration at Exhibit 2. However, MGC did not respond to MPAA and SDC, and, instead, filed the MGC Opposition on January 29, 2018.

Following receipt of the MGC Opposition, counsel for SDC reached out to MGC expressing confusion over the filing, given the understanding reached during the parties' January 25 conference call with the Judges. *See* Exhibit A, Plovnick Declaration at Exhibit 3. MGC responded to SDC and MPAA, indicating that (1) MGC does not agree that all motions are on hold, (2) MGC seeks discovery from MPAA and SDC in order to develop rebuttal testimony attacking the MPAA and SDC methodologies, and (3) MGC will not agree to identify its expert witness to MPAA or SDC prior to the submission of MGC's written rebuttal statement. *See id.* MPAA and SDC both responded to MGC indicating their willingness to enter into a stipulation to permit a qualified, MGC expert to review the mathematical accuracy of the calculations implementing the MPAA and SDC methodologies without prejudice to MPAA and SDC's pending motions. *See id.* MGC proceeded to reject MPAA and SDC's proposal, and asked that the parties file a notice with the Judges to inform them that the parties could not agree to resolve the case through a stipulation and requesting that the Judges issue rulings on the pending motions. *See id.*

The parties submitted their *Joint Notice Of Parties' Failure To Reach Stipulation* on February 5, 2018. In light of the parties' inability to resolve the Distribution Phase of this case through stipulation, MPAA submits the instant Reply.

DISCUSSION

I. MGC Is Subject To Automatic Dismissal For Its Failure To File The Mandatory Written Direct Statement In This Proceeding, and Is Precluded From Seeking Discovery.

As explained in both the Joint Motion To Strike, and the Motion To Quash, MGC intentionally disregarded the Judges' regulations and orders in these proceedings by submitting a defective, placeholder pleading to the Judges on December 29, 2017 in lieu of a written direct statement. *See* Joint Motion To Strike at 1-8; Motion To Quash at 3-5. MGC's failure to submit a timely and compliant written direct statement warrants automatic dismissal from these proceedings. *See* Joint Motion To Strike at 8-9 (citing *Order Granting In Part Allocation Phase Parties' Motion To Dismiss Multigroup Claimants And Denying Multigroup Claimants' Motion For Sanctions Against Allocation Phase Parties* (August 11, 2017) at 4 ("August 11 2017 Order")); *Order Granting Sound Exchange Motion To Dismiss Muzak LLC*, Docket No. 2006-1 CRB DSTR (January 10, 2007); *Order Granting SoundExchange's Motion To Dismiss Persons And Entities That Did Not File A Written Direct Statement*, Docket No. 2005-1 CRB DTRA (January 20, 2006); *Order*, Docket No. 2000-9 CARP DTRA 1&2 (April 23, 2001)).¹ As a party subject to automatic dismissal, and thus not entitled to participate at all in the Distribution Phase, MGC plainly has no right to discovery here. *See* Motion To Quash at 4-5.

Apparently cognizant that the MGC December 29 Filing failed to comply with the regulations or the Judges' orders in this proceeding, MGC tries to present alternative facts. *First*, despite clear statements in its filing to the contrary, MGC argues that it did present a distribution methodology in the MGC December 29 Filing—because MGC will “accept the results of

¹ MGC's dismissal is also warranted for its persistent failure to comply with the Judges' regulations and orders in these proceedings. *See* Joint Motion To Strike at 9-11 (citing *Order*, Nos. 2001-8 CARP CD 98-99, *et al.*, at 6 (June 26, 2006)).

methodologies submitted by adverse parties in these proceedings.” MGC Opposition at 2. This argument rings hollow, because if MGC really intended to “accept the results” of the methodologies submitted by MPAA and SDC, this proceeding would already have concluded.² Rather, MGC has made it clear, both in its pleadings and in its email correspondence, that it has no intention of accepting the results of the MPAA and SDC methodologies. Instead, MGC intends to attack the results of the MPAA and SDC methodologies in its written rebuttal statement, and present expert rebuttal testimony advocating for adjustments and/or modifications to the MPAA and SDC methodologies that would result in *different* royalty shares for MGC.³ Certainly, MGC’s conduct does not indicate an intention to “accept the results” of the MPAA and SDC methodologies. Accordingly, MGC’s suggestion that it actually provided a methodology in the MGC December 29 Filing is inaccurate.

Second, MGC argues that its failure to comply with the Judges’ regulations and orders in the MGC December 29 Filing should be excused because of written direct statement filings SDC made in the 2000-2003 Cable Phase II proceeding and the 2004-2005 Cable Phase I proceeding, both of which MGC argues failed to present a distribution methodology. *See* MGC Opposition at 2-3. But both cases are clearly distinguishable.

² The royalty shares resulting from both the MPAA and SDC methodologies are clearly set forth in the written direct statements filed by MPAA and SDC on December 29, 2017. However, MGC has failed, even now, to indicate that it is revising its claims in this proceeding to reflect acceptance of those royalty shares. Instead, MGC has chosen to maintain its bogus 100% claims of both the Program Suppliers and Devotional categories. MGC has also rejected MPAA and SDC’s offer to permit a qualified MGC expert to verify the accuracy of the calculations implementing the MPAA and SDC methodologies without prejudice to the pending MPAA and SDC motions in an effort to achieve a stipulated resolution to this proceeding. *See supra* at 3.

³ As MPAA and SDC explained in the Joint Motion To Strike, testimony purporting to present a methodology adjusting or modifying either the MPAA or SDC methodologies, presented for the first time as a part of MGC’s rebuttal case would violate the Judges’ prior orders in royalty distribution proceedings. *See* Joint Motion To Strike at 7-8.

In the 2000-2003 Cable Phase II proceeding, SDC presented a written direct statement seeking 100% of the Devotional category funds while it formally sought disallowance of all the Devotional category claims brought by MGC's predecessor, Independent Producers Group ("IPG"). However, following issuance of the Claims Order on October 23, 2017, no such claims-related motions remain pending in this proceeding. Accordingly, MGC cannot rely on the 2000-2003 Cable Phase II proceeding to justify its actions here.

In the 2004-2005 Cable Phase I proceeding, SDC presented testimony from three different witnesses in its written direct statement, including a qualitative analysis of the value of Devotional programming submitted by Dr. William Brown. *See* 75 Fed. Reg. 57063, 57064 n.7 (September 17, 2010) (recognizing that SDC presented direct testimony from Dr. Charles Stanley, Bruce Johansen, and Dr. William Brown). Dr. Brown's qualitative analysis in that proceeding focused on eight different factors that, in his view, demonstrated the increased value of Devotional programming during 2004 and 2005. *See id.*, 75 Fed. Reg. at 57074. The fact that Dr. Brown's qualitative analysis was ultimately not persuasive to the Judges, *see* 75 Fed. Reg. at 57075, does not mean that Dr. Brown's analysis in that proceeding failed to present a methodology. Moreover, SDC's written direct statement in that proceeding stands in sharp contrast to the MGC December 29 Filing, which did not provide *any* analysis or methodology regarding the value of MGC's claims *at all*. Thus, MGC's attempt to compare the MGC December 29 Filing with SDC's presentation in the 2004-2005 Cable Phase I proceeding is also inapt.

At bottom, MGC has done nothing to rebut MPAA's argument that the MGC December 29 Filing is defective, and has not provided any reason or rationale to explain why the Judges

should not find MGC in procedural default in the Distribution Phase of this proceeding, and quash the improper MGC Requests.

II. MGC Has No Basis For Its Claim That MPAA “Never Intended To Comply With Discovery” In This Proceeding.

Without genuine legal arguments to support its entitlement to discovery, MGC resorts to mud-slinging, accusing MPAA of bad faith because MPAA would not agree to the unreasonably tight discovery schedule which MGC proposed (1) immediately prior to the New Years’ 2018 holiday weekend, and (2) before MPAA had been provided any opportunity to even see (much less review) the MGC December 29 Filing. *See* MGC Opposition at Exhibit B. Indeed, MPAA’s desire to first review the MGC December 29 Filing before committing to a discovery schedule is abundantly reasonable. *First*, MPAA had no way to know in advance the volume of material that would be included in the MGC December 29 Filing, which, if known, would have governed the discovery schedule in terms of how quickly MPAA could prepare and propound discovery requests. *Second*, MPAA’s reluctance to commit to a discovery schedule in advance of seeing the MGC December 29 Filing is also well-justified following MGC’s previous actions in this very proceeding, including MGC’s previous attempt to present a placeholder filings on June 30, 2017, in lieu of the required written direct statements (which the Judges ultimately struck as noncompliant with the regulations). *See Order Granting In Part Multigroup Claimants’ Expedited Motion To Continue Distribution Proceedings Following Resolution Of Pending Motions*, at 5 (August 11, 2017). Indeed, MPAA’s caution with regard to MGC’s proposal proved entirely reasonable, given MGC’s ultimate decision to present yet-another noncompliant submission to the Judges on December 29, 2017, which once again placed MGC in procedural default in this proceeding.

CONCLUSION

For the foregoing reasons, the Judges should grant MPAA's Motion To Quash, and quash the MGC Requests.

Respectfully submitted,

Dated: February 5, 2018

/s/ Gregory O. Olaniran

Gregory O. Olaniran
D.C. Bar No. 455784
Lucy Holmes Plovnick
D.C. Bar No. 488752
Alesha M. Dominique
D.C. Bar No. 990311
MITCHELL SILBERBERG & KNUPP LLP
1818 N Street N.W., 8th Floor
Washington, D.C. 20036
Telephone: (202) 355-7817
Fax: (202) 355-7887
goo@msk.com
lhp@msk.com
amd@msk.com

*Attorneys for MPAA-represented Program
Suppliers*

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of February, 2018, a copy of the foregoing pleading was provided to each of the parties on the attached service list, either electronically via the Copyright Royalty Judges' eCRB electronic filing system, or, for those parties not receiving service through eCRB, by Federal Express overnight mail.

/s/ *Lucy Holmes Plovnick*
Lucy Holmes Plovnick

SERVICE LIST

JOINT SPORTS CLAIMANTS

Robert Alan Garrett
Sean Laane
Michael Kientzle
Bryan L. Adkins
ARNOLD & PORTER LLP
601 Massachusetts Avenue, N.W.
Washington, D.C. 20001

SETTLING DEVOTIONAL CLAIMANTS

Matthew J. MacLean
Michael A. Warley
Jessica T. Nyman
PILLSBURY WINTHROP
SHAW PITTMAN LLP
1200 Seventeenth Street NW
Washington, DC 20036

SETTING DEVOTIONAL CLAIMANTS/PROFESSIONAL BULL RIDERS

Arnold P. Lutzker
Benjamin Sternberg
LUTZKER & LUTZKER LLP
1233 20th Street, NW
Suite 703
Washington, DC 20036

PUBLIC TELEVISION CLAIMANTS

Ronald G. Dove, Jr.
Lindsey Tonsager
Dustin Cho
COVINGTON & BURLING LLP
One City Center
850 10th Street NW
Washington, DC 20001

COMMERCIAL TELEVISION CLAIMANTS

NATIONAL ASSOCIATION OF BROADCASTERS

John I. Stewart, Jr.
Ann Mace
David Ervin
CROWELL & MORING LLP
1001 Pennsylvania Ave., NW
Washington, DC 20004-2595

MUSIC CLAIMANTS

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS

Samuel Mosenkis
Jackson Wagener
ASCAP
One Lincoln Plaza
New York, NY 10023

BROADCAST MUSIC, INC.

Joseph J. DiMona
BROADCAST MUSIC, INC.
7 World Trade Center
250 Greenwich Street
New York, NY 10007-0030

Brian Coleman
Jennifer T. Criss
DRINKER BIDDLE & REATH LLP
1500 K Street, NW – Suite 1100
Washington, DC 20005

SESAC, INC.

John C. Beiter
LEAVENS, STRAND & GLOVER LLC
1102 17th Avenue South
Suite 306
Nashville, TN 37212

CANADIAN CLAIMANTS

L. Kendall Satterfield
SATTERFIELD PLLC
1629 K Street NW, Suite 300
Washington, DC 20006

Victor Cosentino
LARSON & GASTON LLP
200 S. Los Robles Avenue, Suite 530
Pasadena, CA 91101

MULTIGROUP CLAIMANTS SPANISH LANGUAGE PRODUCERS

Brian D. Boydston
PICK & BOYDSTON LLP
10786 Le Conte Avenue
Los Angeles, CA 90024

NATIONAL PUBLIC RADIO

Jonathan D. Hart
Gregory A. Lewis
NATIONAL PUBLIC RADIO
1111 North Capitol Street, NE
Washington, DC 20002

MAJOR LEAGUE SOCCER

Edward S. Hammerman
HAMMERMAN PLLC
5335 Wisconsin Ave., Suite 440
Washington, DC 20015-2054

EXHIBIT A

)	
<i>In re</i>)	
DISTRIBUTION OF CABLE)	CONSOLIDATED DOCKET NO.
ROYALTY FUNDS)	14-CRB-0010-CD/SD (2010-13)
)	
)	
<i>In re</i>)	
DISTRIBUTION OF SATELLITE)	
ROYALTY FUNDS)	
)	

I, Lucy Holmes Plovnick, declare:

2. I have personal knowledge of the following facts and, if called and sworn as a witness, could and would competently testify thereto.

Plovnick Decl., Reply In Support Of MPAA Motion To Quash MGC Discovery Requests | 1

4. Counsel for MPAA, MGC, and SDC participated in the conference call with the Judges as requested by Chief Judge Barnett on January 25, 2018. I and my law partner, Gregory O. Olaniran, participated in the conference call on behalf of MPAA. During that call, the parties and the Judges discussed placing all motions on hold in order to allow the parties to explore whether they could resolve the Distribution Phase of this proceeding via stipulation. The parties and the Judges also discussed providing MGC a means to perform accuracy checking on the computations implementing the MPAA and SDC methodologies without prejudice to MPAA and SDC's pending motions; the need for MGC to identify a qualified expert to perform such accuracy checking; and the information MGC would require regarding the software applications used by MPAA and SDC in order to identify such a qualified expert.

5. Attached hereto as Exhibit 2 is a true and correct copy of email correspondence between myself, Brian D. Boydston, counsel for MGC, and Matthew J. MacLean, counsel for SDC, dated January 12 and 25, 2018.

6. Attached hereto as Exhibit 3 is a true and correct copy of email correspondence between myself, Mr. Boydston, and Mr. MacLean, dated January 29-30 and February 2, 2018.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 5th day of February, 2018, at Washington, D.C.


Lucy Holmes Plovnick

EXHIBIT 1

Plovnick, Lucy

From: Barnett, Suzanne <suba@loc.gov>
Sent: Friday, January 12, 2018 12:28 PM
To: Olaniran, Greg; Plovnick, Lucy; Boydston; matthew.maclean@pillsburylaw.com
Cc: Feder, Jesse; Strickler, David; Strasser, Richard; Whittle, Kimberly; Blaine, Anita
Subject: 2010-13 cable and satellite distributions

Counsel,

The Judges have reviewed the parties' written direct statements relating to distribution issues in the captioned matter.

Multigroup Claimants have chosen to proceed without proposing a unique distribution methodology, but rather to accept, subject to accuracy testing, the methodologies of the two remaining participants, MPAA-Represented Program Suppliers and Settling Devotional Claimants. At the same time, Multigroup Claimants have stated their claim at 100% of the funds ultimately allocated to the Program Suppliers and Devotional categories.

Given the current posture of the distribution phase of this proceeding, the Judges conclude that there is no controversy with regard to applicable methodologies relating to distribution of cable or satellite royalty payments on deposit. The Judges, therefore, would like to schedule a telephone conference with participants' counsel at the earliest mutually convenient time, *after* January 24.

At the telephone conference, counsel should be prepared to discuss (without legal or factual argument) stipulation to a distribution phase determination and the timing of such a stipulation. The Judges would be amenable to adopting a stipulated distribution determination that is final and appealable, notwithstanding the remaining issues in the proceeding relating to allocation among the participant categories.

As MPAA-Represented Program Suppliers is the largest remaining participant in this proceeding, the Judges ask that MPAA counsel coordinate scheduling and handle logistics for the call.

Thank you.

Suzanne M. Barnett

Chief Judge | Copyright Royalty Board
Library of Congress
101 Independence Ave SE
Washington, DC 20540
202.707.8386
suba@loc.gov



EXHIBIT 2

Plovnick, Lucy

From: Plovnick, Lucy
Sent: Thursday, January 25, 2018 7:45 PM
To: 'MacLean, Matthew J.'; Brian D. Boydston, Esq.
Cc: 'Arnold Lutzker' (arnie@lutzker.com); Ben Sternberg (Ben@lutzker.com); Nyman, Jessica T.; Warley, Michael A.; Olaniran, Greg
Subject: RE: Conference call among CRB, MPAA, SDC, and MGC RE 2010-13 Cable and Satellite Distribution Phase

Brian,

The codes underlying MPAA's methodology are also in STATA.

Lucy



Lucy Holmes Plovnick | Partner, through her professional corporation

T: 202.355.7918 | lh@msk.com

Mitchell Silberberg & Knupp LLP | www.msk.com

1818 N Street NW, 8th Floor, Washington, DC 20036

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From: MacLean, Matthew J. [mailto:matthew.maclean@pillsburylaw.com]
Sent: Thursday, January 25, 2018 7:16 PM
To: Brian D. Boydston, Esq.
Cc: 'Arnold Lutzker' (arnie@lutzker.com); Ben Sternberg (Ben@lutzker.com); Nyman, Jessica T.; Warley, Michael A.; Plovnick, Lucy; Olaniran, Greg
Subject: RE: Conference call among CRB, MPAA, SDC, and MGC RE 2010-13 Cable and Satellite Distribution Phase

Brian,

The codes underlying the SDC's methodology are in STATA. Please let us know when you can identify somebody capable and qualified to perform accuracy testing, and then we will discuss next steps.

Matt

Matthew J. MacLean | Partner

Pillsbury Winthrop Shaw Pittman LLP

1200 Seventeenth Street NW | Washington, DC 20036-3006

t 202.663.8183

matthew.maclean@pillsburylaw.com | [website bio](#)



From: Brian D. Boydston, Esq. [<mailto:brianb@ix.netcom.com>]
Sent: Thursday, January 25, 2018 1:49 PM
To: Plovnick, Lucy <lh@msk.com>; MacLean, Matthew J. <matthew.maclean@pillsburylaw.com>; 'Barnett,Suzanne' <suba@loc.gov>; Olaniran,Greg <goo@msk.com>; 'Arnold Lutzker' (arnie@lutzker.com) <arnie@lutzker.com>; Feder,Jesse <jfed@loc.gov>; Strickler,David <dstr@loc.gov>; Strasser,Richard <rstr@loc.gov>; Whittle,Kimberly <kiwh@loc.gov>; Blaine,Anita <anbr@loc.gov>; Dominique,Alesha <amd@msk.com>
Subject: RE: Conference call among CRB, MPAA, SDC, and MGC RE 2010-13 Cable and Satellite Distribution Phase

Thanks

-----Original Message-----

From: "Plovnick, Lucy"
Sent: Jan 25, 2018 10:44 AM
To: "Brian D. Boydston, Esq." , "MacLean,Matthew J." , "Barnett,Suzanne" , "Olaniran, Greg" , "'Arnold Lutzker' (arnie@lutzker.com)" , "Feder,Jesse" , "Strickler,David" , "Strasser,Richard" , "Whittle,Kimberly" , "Blaine,Anita" , "Dominique, Alesha"
Subject: RE: Conference call among CRB, MPAA, SDC, and MGC RE 2010-13 Cable and Satellite Distribution Phase

<ZZZ![endif]--><ZZZ!--[if 9]msogte="">
Brian,

Yes, the call is scheduled for 2:30PM EST.

Lucy



Lucy Holmes Plovnick | Partner, through her professional corporation

T: 202.355.7918 | lh@msk.com

Mitchell Silberberg & Knupp LLP | www.msk.com

1818 N Street NW, 8th Floor, Washington, DC 20036

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From: Brian D. Boydston, Esq. [<mailto:brianb@ix.netcom.com>]
Sent: Thursday, January 25, 2018 1:44 PM
To: Plovnick, Lucy; 'MacLean,Matthew J.'; 'Barnett,Suzanne'; Olaniran, Greg; 'Arnold Lutzker' (arnie@lutzker.com); Feder,Jesse; Strickler,David; Strasser,Richard; Whittle,Kimberly; Blaine,Anita; Dominique, Alesha
Subject: Re: Conference call among CRB, MPAA, SDC, and MGC RE 2010-13 Cable and Satellite Distribution Phase

By the way, we are doing this at 2:30 pm EST, not 2:00 pm EST, correct?

Brian

-----Original Message-----

From: "Plovnick, Lucy"

Sent: Jan 12, 2018 3:05 PM

To: "Brian D. Boydston, Esq." , "MacLean,Matthew J." , "Barnett,Suzanne" , "Olaniran, Greg" , "Arnold Lutzker' (arnie@lutzker.com)" , "Feder,Jesse" , "Strickler,David" , "Strasser,Richard" , "Whittle,Kimberly" , "Blaine,Anita" , "Dominique, Alesha"

Subject: Conference call among CRB, MPAA, SDC, and MGC RE 2010-13 Cable and Satellite Distribution Phase

Dial:

Main: 310-312-2012

Toll-free: 877-770-4111

Participant Code: 0179901

</ZZZ![endif]--><>

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EXHIBIT 3

Plovnick, Lucy

From: Plovnick, Lucy
Sent: Friday, February 02, 2018 3:30 PM
To: 'MacLean, Matthew J.'; Brian D. Boydston, Esq.; Olaniran, Greg; arnie@lutzker.com
Cc: Warley, Michael A.; Nyman, Jessica T.
Subject: RE: Multigroup Claimants Opposition to Motion to Quash

Brian,

From your emails below, it sounds like you were on a different conference call than the one we participated in with the Judges.

MPAA understood that the Judges asked the parties to work together and see if there was a way that we could agree to resolve this proceeding in an expedited manner via stipulation. MPAA made a proposal in good faith that would have permitted the parties to do that, without prejudice to any party's position on the pending motions, or to MGC's claim that it is entitled to receive discovery. Nevertheless, MGC has rejected it.

MPAA agrees that the parties should file a joint notice with the Judges. Matt, we have reviewed your draft, and MPAA is fine with it.

Lucy



Lucy Holmes Plovnick | Partner, through her professional corporation

T: 202.355.7918 | lh@msk.com

Mitchell Silberberg & Knupp LLP | www.msk.com

1818 N Street NW, 8th Floor, Washington, DC 20036

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From: MacLean, Matthew J. [<mailto:matthew.maclean@pillsburylaw.com>]
Sent: Friday, February 02, 2018 3:16 PM
To: Brian D. Boydston, Esq.; Plovnick, Lucy; Olaniran, Greg; arnie@lutzker.com
Cc: Warley, Michael A.; Nyman, Jessica T.
Subject: RE: Multigroup Claimants Opposition to Motion to Quash

Thank you, Brian. I have read your several pleadings in which you have raised these contentions, and I presume you have read or will read our responses. Here is a proposed joint notice for everyone's consideration.

Matthew J. MacLean | Partner

Pillsbury Winthrop Shaw Pittman LLP

1200 Seventeenth Street NW | Washington, DC 20036-3006

t 202.663.8183

matthew.maclean@pillsburylaw.com | [website bio](#)

From: Brian D. Boydston, Esq. [<mailto:brianb@ix.netcom.com>]
Sent: Friday, February 2, 2018 2:58 PM
To: MacLean, Matthew J. <matthew.maclean@pillsburylaw.com>; Plovnick, Lucy <lh@msk.com>; Olaniran, Greg <goo@msk.com>; arnie@lutzker.com
Cc: Warley, Michael A. <michael.warley@pillsburylaw.com>; Nyman, Jessica T. <jessica.nyman@pillsburylaw.com>
Subject: RE: Multigroup Claimants Opposition to Motion to Quash

I will keep my eyes open for the notice.

Also, bear in mind that in addition to the SDC's lack of a methodology in the 2000-2003 Cable Phase II proceeding, the SDC also did the same in the the 2004-2005 Phase I cable proceeding, and, in lieu of presenting its own methodology, the SDC advocated application of the JSC's sponsored Bortz survey.

Brian

-----Original Message-----

From: "MacLean, Matthew J."
Sent: Feb 2, 2018 11:32 AM
To: "Brian D. Boydston, Esq." , "Plovnick, Lucy" , "Olaniran, Greg" , "arnie@lutzker.com"
Cc: "Warley, Michael A." , "Nyman, Jessica T."
Subject: RE: Multigroup Claimants Opposition to Motion to Quash

<ZZZ![ENDIF]--><ZZZ!--[IF gtemso9]="">

Brian,

Thank you for clarifying. I see that we are on very different pages. I agree with your suggestion that we should file a joint notice. We will circulate a proposed notice shortly.

Matt

Matthew J. MacLean | Partner

Pillsbury Winthrop Shaw Pittman LLP

1200 Seventeenth Street NW | Washington, DC 20036-3006

t 202.663.8183

matthew.maclean@pillsburylaw.com | [website bio](#)

From: Brian D. Boydston, Esq. [<mailto:brianb@ix.netcom.com>]
Sent: Friday, February 2, 2018 1:53 PM
To: MacLean, Matthew J. <matthew.maclean@pillsburylaw.com>; Plovnick, Lucy <lh@msk.com>; Olaniran, Greg <goo@msk.com>; arnie@lutzker.com
Cc: Warley, Michael A. <michael.warley@pillsburylaw.com>; Nyman, Jessica T. <jessica.nyman@pillsburylaw.com>
Subject: RE: Multigroup Claimants Opposition to Motion to Quash

Dear Matt and Lucy,

I thought my last email was clear, but I will be more specific.

My understanding is that you essentially want to leverage your pending (or temporarily suspended) motions to strike, and companion motions to quash, into an agreement by Multigroup Claimants to accept, in lieu of normal discovery responses, a stipulation whereby the MPAA and SDC transmit limited information about their methodologies to a third party chosen by MGC, but approved by the SDC and MPAA, who would then review the information and report its findings.

That is unacceptable to MGC.

MGC believes that the motions to strike and motions to quash are unmeritorious to the point of being specious for the reasons we have stated, but none more glaring than the facts that there is no legal authority for the relief sought, and the empirical authority is to the contrary as in the 2000-2003 Cable proceeding, where the SDC proffered no methodology in its written direct statement, yet claimed 100% of the pool, the CRB nevertheless did not strike the SDC claims.

Therefore, MGC has no motivation to surrender its normal discovery rights and accept limited information and be forced to evaluate the SDC and MPAA methodologies as the SDC and MPAA dictate.

Therefore, unless the SDC and MPAA are willing to comply with MGC's discovery requests, the parties must proceed with the pending law and motion you have initiated. If that is the direction we must go, please confirm that and I suggest that we then submit a joint notice to the Judges stating that we ask them to rule on the pending motions when they have been fully briefed, and the parties complete briefing pursuant to the CRB regulations (or by an agreed remaining briefing schedule if necessary).

Brian Boydston

-----Original Message-----

From: "MacLean, Matthew J."

Sent: Feb 2, 2018 5:46 AM

To: "Plovnick, Lucy" , "Brian D. Boydston, Esq." , "Olaniran, Greg" , "arnie@lutzker.com"

Cc: "Warley, Michael A." , "Nyman, Jessica T."

Subject: RE: Multigroup Claimants Opposition to Motion to Quash

<ZZZ![ENDIF]--><ZZZ!--[IF gtemso9]="">

Brian,

It has been three days. Are you going to respond to Lucy's and my proposals on how to proceed?

Matt

Matthew J. MacLean | Partner

Pillsbury Winthrop Shaw Pittman LLP

1200 Seventeenth Street NW | Washington, DC 20036-3006

t 202.663.8183

matthew.maclean@pillsburylaw.com | website bio

From: MacLean, Matthew J.

Sent: Tuesday, January 30, 2018 4:55 PM

To: Plovnick, Lucy <lh@msk.com>; 'Brian D. Boydston, Esq.' <brianb@ix.netcom.com>; Olaniran, Greg <goo@msk.com>; arnie@lutzker.com

Cc: Warley, Michael A. <michael.warley@pillsburylaw.com>; Nyman, Jessica T. <jessica.nyman@pillsburylaw.com>

Subject: RE: Multigroup Claimants Opposition to Motion to Quash

Brian,

I agree with Lucy's recollection of what was discussed, and the SDC would agree to a process along the lines she describes.

In my recollection, we specifically discussed putting discovery motions on hold, we specifically discussed trying to reach agreement on limited discovery to allow MGC to check computations (and not to propose a new or revised methodology), and we specifically discussed identification of an expert who was qualified to check computations. You said that you would not be able to identify such an expert without knowing the software application, and I said I would let you know that later the same day, which I did. (As a reminder, it is STATA.)

The purpose of identifying an expert is so that we know with whom we are entrusting our data, and so that we know that our experts will not have to debate with Mr. Galaz about whether their codes are correct. We're not providing the data for "rebuttal" (how can you rebut a methodology that you have "accepted"?). We would be providing it to facilitate a compromise by allowing for accuracy testing.

Based on your email below, I'm not even sure if you are accepting the methodologies or not. You seem to leave the door wide open to proposing new or modified methodologies. We especially need clarity on this point, because it is the heart of the proposed compromise, and it would govern the scope of a limited production for the purpose of facilitating accuracy testing.

If there is room to compromise, then I'm all for it. If there is not room to compromise, then let's proceed with the motions and let chips fall where they may.

Matt

Matthew J. MacLean | Partner

Pillsbury Winthrop Shaw Pittman LLP

1200 Seventeenth Street NW | Washington, DC 20036-3006

t 202.663.8183

matthew.maclean@pillsburylaw.com | website bio

From: Plovnick, Lucy [<mailto:lh@msk.com>]
Sent: Tuesday, January 30, 2018 4:30 PM
To: 'Brian D. Boydston, Esq.' <brianb@ix.netcom.com>; MacLean, Matthew J. <matthew.maclean@pillsburylaw.com>; Olaniran, Greg <goo@msk.com>; arnie@lutzker.com
Cc: Warley, Michael A. <michael.warley@pillsburylaw.com>; Nyman, Jessica T. <jessica.nyman@pillsburylaw.com>
Subject: RE: Multigroup Claimants Opposition to Motion to Quash

Brian,

As we discussed with the Judges on our conference call last week, MPAA is willing to agree to a stipulation among MGC, SDC, and MPAA whereby MGC would identify a qualified, testifying expert and then MPAA and SDC would agree to produce, directly to that qualified MGC expert, the specific documents underlying MPAA and SDC's respective distribution methodologies that would allow him or her to check the mathematical accuracy of the respective methodologies' calculations. In order for such an exchange to be done without prejudice to the pending motions, MPAA would also require, as a part of the stipulation, a confidentiality agreement that would limit receipt of any documents produced pursuant to the stipulation to MGC's qualified expert.

In our view, the process described above is consistent with what we discussed with the Judges last week, as it would allow MGC the opportunity to commission its own expert to check the mathematical accuracy of the calculations implementing the MPAA and SDC methodologies so that we can all be in a position to present a stipulation to the Judges regarding royalty shares. The identity and qualification of MGC's expert is a necessary first step to implementing this process, because MPAA and SDC need assurance that MGC's expert is qualified to test the accuracy of all the sophisticated calculations in our respective methodologies, both of which (as we told you already) were performed using STATA.

Please respond and let us know if MGC is willing to agree to proceed under such a stipulation. If the parties are unable to come to an agreement on this we will need to advise the Judges.

Lucy



Lucy Holmes Plovnick | Partner, through her professional corporation

T: 202.355.7918 | lh@msk.com

Mitchell Silberberg & Knupp LLP | www.msk.com

1818 N Street NW, 8th Floor, Washington, DC 20036

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From: Brian D. Boydston, Esq. [<mailto:brianb@ix.netcom.com>]
Sent: Tuesday, January 30, 2018 2:13 PM
To: MacLean,Matthew J.; Olaniran, Greg; Plovnick, Lucy; arnie@lutzker.com
Cc: Warley,Michael A.; Nyman,Jessica T.
Subject: RE: Multigroup Claimants Opposition to Motion to Quash

Dear Matt and Lucy,

With regard to the 2010-2013 proceeding, in our conference call last Thursday, it did sound as if the Judges were taking the Motions to Strike filed by the SDC and MPAA off calendar when judge Barnett said that you could re-file them without prejudice.

However, I did not hear any similar comment by the Judges about your motions to quash. Therefore, I thought it prudent to file timely oppositions thereto (since the SDC one was filed later, we have calendared the opposition for later). If we did not, no doubt you would have argued they were untimely.

With regard to how MGC will assess the SDC and MPAA methodologies, and who it hires to do so, that is no one's business but MGC's.

There is no requirement that parties to these proceedings identify their experts until such experts file declarations and reports. As such, in these proceedings rebuttal experts have in the past been identified in the written rebuttal statements when they are filed. We see no reason why that should be different here.

At this juncture, as the Judges clearly believe, it would seem to make sense for all parties for the SDC and MPAA to provide MGC with the information MGC needs to replicate the SDC and MPAA methodologies and determine whether or not MGC has any disagreement with the distribution conclusions reached thereby.

However, contrary to your implication, MGC never agreed to accept limited responses to its discovery and the Judges never ordered the same. Moreover, I do not see why it would even need to be limited since all of MGC's requests are focused on documents underlying the SDC and MPAA methodologies, or alternatives that were, or were not, considered.

That said whether you produce the information MGC needs to replicate the SDC and MPAA methodologies and determine whether or not MGC has any disagreement with the distribution conclusions reached thereby to MGC by way of formal responses to MGC's discovery or not, MGC will attempt to make such a determination. If the MPAA and SDC refuse to do that, MGC will wait for the Judges to rule on the Motions to Quash, and, if they are denied, make such determinations when the SDC and MPAA formally respond to discovery.

Again, all this seems unnecessarily complex. If the SDC and MPAA will simply open up their methodologies, as has always been the case through discovery in past proceedings, MGC will be able to determine whether or not it has any dispute with the conclusions reached by the SDC and MPAA. If there are disputes and we cannot resolve them, we will then submit those, hopefully narrow, disputes to the Judges. If not, we should be able to stipulate to a distribution order and efficiently wind up this proceeding.

Brian Boydston

Counsel for Multigroup Claimants

-----Original Message-----

From: "MacLean, Matthew J."

Sent: Jan 29, 2018 3:05 PM

To: "Brian D. Boydston, Esq." , "goo@msk.com" , "lh@msk.com" , "arnie@lutzker.com"

Cc: "Warley, Michael A." , "Nyman, Jessica T."

Subject: RE: Multigroup Claimants Opposition to Motion to Quash

Brian,

I'm a little confused by this filing, because I had thought we were in agreement with the Judges last week that the pending motion to strike and motions to quash would be on hold while the parties see if they can work out an agreement for some limited discovery to allow Multigroup's expert to confirm calculations so that a stipulated order can be entered. I note that you have not yet responded to my and Lucy's emails informing you of the software application involved so that you can identify an appropriate expert.

Should I understand by your somewhat unconciliatory opposition (accusing MPAA of "bad faith" and "fraud on the court") and your non-response to our emails that you are no longer interested in putting pending motions on hold as the Judges suggested?

I think we ought to be clear with the Judges and with each other whichever way we decide to go. If there is still an intent to pursue détente, I would suggest we have a conference call to work out a stipulation. If it is your intent to withdraw from such an effort, I would suggest we let the Judges know that clearly so that they do not share my confusion over your opposition.

Please let me know what exactly you are trying to do.

Matt

Matthew J. MacLean | Partner

Pillsbury Winthrop Shaw Pittman LLP

1200 Seventeenth Street NW | Washington, DC 20036-3006

t 202.663.8183

matthew.maclea@pillsburylaw.com

-----Original Message-----

From: Brian D. Boydston, Esq. [<mailto:brianb@ix.netcom.com>]

Sent: Monday, January 29, 2018 4:51 PM

To: goo@msk.com; lh@msk.com; jstewart@crowell.com; lksatterfield@satterfield-pllc.com;

Victor.cosentino@larsongaston.com; arnie@lutzker.com; MacLean, Matthew J.

<matthew.maclean@pillsburylaw.com>; Robert.garrett@apks.com; sean.laane@apks.com;
Michael.kientzle@apks.com; Mike.Mellis@mlb.com; phochberg@shulmanrogers.com;
Ritchie.thomas@squirepb.com; rdove@cov.com; ltonsager@cov.com; dcho@cov.com
Subject: Multigroup Claimants Opposition to Motion to Quash

Dear Counsel, attached hereto is a courtesy copy of Multigroup Claimants' Opposition to the MPAA's Motion to Quash Discovery Requests in the 2010-2013 proceedings.

Brian Boydston
Counsel to Multigroup Claimants

The contents of this message, together with any attachments, are intended only for the use of the individual or entity to which they are addressed and may contain information that is legally privileged, confidential and exempt from disclosure. If you are not the intended recipient, you are hereby notified that any dissemination, distribution, or copying of this message, or any attachment, is strictly prohibited. If you have received this message in error, please notify the original sender or the Pillsbury Winthrop Shaw Pittman Help Desk at Tel: 800-477-0770, Option 1, immediately by telephone or by return E-mail and delete this message, along with any attachments, from your computer. Thank you.

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Certificate of Service

I hereby certify that on Monday, February 05, 2018 I provided a true and correct copy of the Reply In Support Of Motion To Quash Discovery Requests Of Multigroup Claimants to the following:

American Society of Composers, Authors and Publishers (ASCAP), represented by Sam Mosenkis served via Electronic Service at smosenkis@ascap.com

Spanish Language Producers, represented by Brian D Boydston served via Electronic Service at brianb@ix.netcom.com

Joint Sports Claimants (JSC), represented by Michael E Kientzle served via Electronic Service at michael.kientzle@apks.com

Multigroup Claimants (MGC), represented by Brian D Boydston served via Electronic Service at brianb@ix.netcom.com

National Public Radio (NPR), represented by Gregory A Lewis served via Electronic Service at glewis@npr.org

SESAC, Inc., represented by Christos P Badavas served via Electronic Service at cbadavas@sesac.com

Major League Soccer, LLC, represented by Edward S. Hammerman served via Electronic Service at ted@copyrightroyalties.com

Broadcast Music, Inc. (BMI), represented by Janet Fries served via Electronic Service at janet.fries@dbr.com

Canadian Claimants Group, represented by Victor J Cosentino served via Electronic Service at victor.cosentino@larsongaston.com

Settling Devotional Claimants (SDC), represented by Arnold P Lutzker served via Electronic Service at arnie@lutzker.com

Public Broadcasting Service (PBS) and Public Television Claimants (PTC), represented by Ronald G. Dove Jr. served via Electronic Service at rdove@cov.com

Broadcaster Claimants Group (BCG) aka NAB aka CTV, represented by John Stewart
served via Electronic Service at jstewart@crowell.com

Signed: /s/ Lucy H Plovnick